U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

Issue date: 29Jan2002

CASE NO.: 2001-LHC-1234

OWCP NO.: 18-73816

In the Matter of:

DANNY COHEN
Claimant

v.

CONTINENTAL MARITIME OF SAN DIEGO
Employer

and

MAJESTIC INSURANCE COMPANY
Carrier

APPEARANCES:

Jeffrey Winter, Esquire
For the Claimant

Frank B. Hugg, Esquire
For the Employer and Carrier

BEFORE: ROBERT J. LESNICK
Administrative Law Judge

DECISION AND ORDER

The above-captioned claim arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, (hereinafter "The Act"or "LHWCA"), The claim is brought by Danny Cohen (hereinafter "Claimant") against Majestic Insurance Company (hereinafter "Carrier") and Continental Maritime of San Diego (hereinafter together with the Carrier as "Respondents").

PROCEDURAL HISTORY

Claimant filed this claim for benefits under the Act on July 26, 2000. Claimant alleges that he is entitled to permanent partial disability benefits due to an injury sustained on June 25, 2000. The above-captioned claim was forwarded to the Office of Administrative Law Judges on February 1, 2001 for a formal hearing. Administrative Law Judge David W. DiNardi issued a Notice of Calendar call for June 11, 2001 in San Diego, California. On April 3, 2001, Judge DiNardi assigned the above-captioned claim to the undersigned.

A hearing was conducted in San Diego, California on June 12, 2001 at which time all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and the Regulations. During the hearing Claimant's Exhibits 1 through 13 and 15 through 18, Respondents' Exhibit 1, and Administrative Law Judge's Exhibits 1 through 4 were received into evidence.[1] The parties also submitted post-hearing briefs and claimant submitted a reply brief. All of this evidence has been made part of the record.

UNCONTESTED ISSUES

Neither party has submitted any evidence regarding the following issues. Therefore, I find that:

1.) This claim is covered by the Longshore and Harbor Workers' Compensation Act.

2.) Claimant was injured within the scope and course of his employment with Respondents on June 25, 2000.

3.) An employer/employee relationship existed at the time of Claimant's injury.

4.) Respondents were timely informed of Claimant's injury.

5.) Respondents filed a timely controversion to Claimant's claim for benefits under the Act.

6.) Claimant was paid temporary total disability benefits by Respondents for the time period from July 26, 2000 through October 13, 2000.

ISSUES

1.) The proper amount of Claimant's average weekly wage.

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[1] The following abbreviations have been used in this opinion: RX = Respondents' exhibits; CX A & B = Claimant's exhibits; ALJX = Court exhibits; TR = Hearing Transcript.

2.) The nature and extent of Claimant's permanent disability.

3.) Whether Respondents are entitled to a credit for the overpayment of benefits to Claimant.

4.) Whether Claimant is entitled to interest and penalties.

5.) Whether Claimant's attorney is entitled to fees and costs.

Findings of Fact and Conclusions of Law

Background

At the time of the formal hearing in this matter, Claimant was 43 years old and had been employed as a journeyman electrician for approximately 2 years. (TR 12-13). Claimant was injured on June 25, 2000 while working on the USS Peleliu when he "fell in a hole in the deck plates." (CX 1 & 2). Claimant ceased working immediately after the accident and reported the accident to his supervisor. (CX 1). Claimant was treated by Dr. Alex K. Hahn for the injury on June 28, 2000. (CX 15). Dr. Hahn released Claimant for light duty until June 29, 2000 when Claimant was permitted to resume his usual employment. (CX 15). Claimant was paid temporary total disability benefits from July 26, 2000 through October 16, 2000 at a compensation rate of $471.65, based on an average weekly wage of $707.48. (CX 5, TR 11).

Hearing Testimony

Claimant's Testimony

Claimant testified at the formal hearing as to the nature of his employment with Respondent and his injury. Claimant stated that he was employed as a journeyman electrician with Respondent for approximately 2 years. (TR 13). Before working for Respondent, Claimant worked for 9 years for National Steel and Shipbuilding. (TR 23). Claimant testified that he was injured when he was engaged in repairing equipment on a Navy vessel in dry dock when he "fell into unguarded hole in the deck plates." (TR 13). Claimant testified further that his foot got stuck in the hole, and when Claimant was able to free his foot, it was swollen and Claimant was unable to walk. (TR 13).

Claimant was taken to a doctor within an hour of the injury and was told that he foot was "badly sprained." (TR 13). Claimant explained that he was first under the care of Drs. Hahn and Lukavsky. (TR 24). Claimant stated that he was referred to physical therapy by Dr. Lukavsky, but transferred to Dr. Bernicker because Claimant did not feel that he was receiving adequate care. (TR 25). Claimant felt that the physical therapy ordered by Dr. Lukavsky injured his foot further. (TR 26). Claimant stated further that the treatment he received from Dr. Lukavsky had frustrated him. (TR 26).

Claimant testified that he did not specifically remember Dr. Lukavsky actually touching Claimant's foot, but Claimant assumes that Dr. Lukavsky did so. (TR 26).

Because of his dissatisfaction with his care, Claimant transferred to Dr. Bernicker for "additional help." (TR 26). Claimant stated that he contacted Carrier to obtain an MRI study of his foot, but that he was unable to obtain authorization. (TR 26). Claimant stated that he then decided to seek out an attorney. (TR 26). Claimant's counsel referred him to Dr. Bernicker. (TR 26). Dr. Bernicker also recommended that Claimant undergo physical therapy, but not until Claimant no longer needed the cast or the medications. (TR 27).

At that time, Claimant was told that he had broken bones in his feet that would necessitate the use of a cast and a cane. (TR 14). Claimant testified that Dr. Bernicker prescribed the use of an air cast. (TR 18). However, Claimant further testified that he was unable to use the cast at work because he was unable to perform his job duties while wearing the cast. (TR 18). Claimant felt that the cast would create a dangerous situation at work because the cast caused Claimant's shoes to become too large and fall off. (TR 18). Claimant stated that he does wear the cast while at home "almost all the time." (TR 19). Claimant estimated that he wears the cast at home about 4 to 5 times per week and also on weekends if "standing or engaging in physical activity." (TR 19). Claimant stated that he still has a mass/bump on the outside top of his foot that was not present before the injury and that his third and fourth toes now overlap. (TR 44).

Claimant stated that he no longer is using any prescription medications, but does use Tylenol or aspirin sometimes seven days per week, but usually not less than two times per week. (TR 20). Claimant testified that he has not used any supportive devices since returning to work. (TR 43). Claimant went back to working full duty after 12 weeks, 8 of which were spent engaging in physical therapy. (TR 28). Claimant testified that he has lost wages by being off of work, and that he was anxious to return to work. (TR 28). However, Claimant stated that he is not sure if he has lost the opportunity to earn overtime since returning to work. (TR 45). Claimant was released back to work by Dr. Bernicker on October 13, 2000, even though Claimant's compensation was paid through October 16, 2000. (TR 29). Since returning to work, Claimant's hourly wage has increased to $15.25 per hour. (TR 45).

Claimant went on to state that he eventually returned to work with certain limitations. (TR 15). These limitations include the need "[n]ot to prolong stand, or to prolong walk, or overdo it. At the time that [Claimant] got returned to work, it was supposed to be on a trial basis to see if [Claimant] could do it." (TR 15). Claimant testified that he informed his supervisor that he would be unable to engage in any activity that involves the use of a runged ladder, pulling heavy ship cables, or any tedious jobs that require heavy lifting. (TR 17). Claimant also informed his supervisor that he would need to take more frequent breaks to sit, as needed. (TR 30). Claimant also stated that he needs to use a bicycle at work to move form one area to another. (TR 16 & 30). The bicycle is also useful in aiding Claimant in

carrying his tool bag to and from the pier. (TR 31). Claimant testified that Respondent accommodated Claimant's limitations. (TR 15).

Claimant works an 8 hour day in addition to "sea trials." (TR 31). However, Claimant does not believe that he would be physically able to stand for the full 8 hours shift because of his injury. (TR 31). Claimant explained that a situation where he would be forced to stand all day has never occurred, but that he supposes that he would be able to do so if necessary. (TR 32). Claimant further explained that his job involves different activities and that Claimant has to adapt to the requirements of the job as the day progresses. (TR 33).

Claimant testified to the documents at Claimant's Exhibits 6 & 8. Claimant testified that these appear to be correct copies of Claimant's earning for his time spent with Respondent and National Steel and Shipbuilding. (TR 34-39). Claimant does clarify that one week of unpaid vacation does not appear on the documents. (TR 42).

Claimant testified that his current job with Respondent involves working on two vessels called the McCluskey and the Bellowood. (TR 46). On the McCluskey, Claimant is involved in repairing the "fire main motor operations for the fire main valves." (TR 46). Claimant is also assigned to work on the fuel purifiers on the Bellowood, but he has not been working on this project. (TR 46). During his regular work shift, Claimant stated that he is required to get on and off of the ship for supplies, etc. (TR 47). Claimant estimated that he does this anywhere between 5 and 10 times per day. (TR 47).

Claimant's job duties were described by Dr. Bernicker as including "constant standing, walking, bending, twisting, reaching, lifting 75 pounds, squatting, kneeling, climbing, pushing, pulling, crawling and overhead work." (TR 48). Claimant agrees that these are the requirements of his job, but states that he is not capable of completing all of these requirements. (TR 48).

Dr. William Lukavsky

Dr. William Lukavsky testified on behalf of Respondent at the time of the formal hearing in this matter. Dr. Lukavsky first testified to his credentials that include being a board certified orthopaedic surgeon and engaging in a private practice of orthopaedic surgery for 23 years. (TR 58). Dr. Lukavsky stated that his practice involves almost all adult orthopaedics. He further broke his practice down into 75% of his practice involves the treatment of patients and 25% of his practice is spent engaging in medical/legal activities. (TR 59). As Dr. Lukavsky's practice has progressed, he has focused on problems with the knees and shoulders. (TR 59). Dr. Lukavsky went on to discuss his examination of Claimant.

Dr. Lukavsky first examined Claimant on July 25, 2000. (TR 61). Claimant had been referred to Dr. Lukavsky by Dr. Hahn because Claimant's injury was not progressing to recovery. (TR 61). At that time, Dr. Lukavsky examined and interviewed Claimant and reviewed Dr. Hahn's x-rays of

Claimant's foot and ankle. (TR 61). Dr. Lukavsky noted at this time that Claimant had sustained a foot injury 5 to 6 weeks before the date of the examination. (TR 62). Claimant had reported to Dr. Lukavsky that he had stepped in a hole at work. (TR 62). Dr. Lukavsky ordered that x-rays be taken which showed no fractures. (TR 62). Dr. Lukavsky's initial impression was that Claimant had sustained a soft tissue injury. (TR 62). However, after Claimant continued to experience pain out of proportion to the perceived injury, Dr. Lukavsky believed that Claimant suffered from reflex sympathetic dystrophy, which Dr. Lukavsky explained is a pain syndrome. (TR 62-63).

Dr. Lukavsky examined Claimant a second time in April, 2001 in order to issue a rating report. (TR 63). Dr. Lukavsky explained that since the time of his initial evaluation of Claimant, Claimant had transferred his care to Dr. Bernicker. (TR 63). Dr. Bernicker had also taken x-rays that showed no fractures, but after obtaining a MRI study, Dr. Bernicker found a fracture in Claimant's oscalcis or heel bone. (TR 63).

Dr. Lukavsky testified that the MRI ordered by Dr. Bernicker showed a fracture, "perhaps multiple fracture lines, in the oscalcis bone." (TR 65). The fracture was found in a red and swollen area of the calcaneocuboid joint. (TR 65). Dr. Lukavsky found that other bones had suffered contusions, "and questions of whether or not there were fractures." (TR 67). Dr. Lukavsky explained that the fracture is on the outside top of Claimant's foot." (TR 68). All of the other effected areas are what Dr. Lukavsky described as the "equivalent of a bruise." (TR 68).

Dr. Lukavsky stated that Claimant's fracture extended across two bones: the calcaneus bone which was fractured and the cuboid bone that was "somewhere between a bruise and a crack." (TR 69). Dr. Lukavsky explained the importance of the calcaneus bone by stating that the bone's primary function is to "help the foot bear weight." (TR 69). Claimant's fracture was located in the anterior portion of the calcaneus which involves less transmission of force through the heel and the injury is therefore considered more minor. (TR 70-71).

At the time of the second examination of Claimant, Dr. Lukavsky learned that a fracture had been diagnosed based on the MRI study and Dr. Bernicker's treatment of this condition. (TR 72). Dr. Lukavsky characterized Dr. Bernicker's care of Claimant's injury as "quite appropriate, reasonable." (TR 72). Dr. Lukavsky was then informed that Claimant returned to work in October, 2000 and was presently carrying out his work duties. (TR 72). Dr. Lukavsky noted that Claimant had not received any treatment in the several months preceding the examination, but that Claimant continued to experience discomfort while at work. (TR 72).

Dr. Lukavsky noted that Claimant moved with a "splinting limp." (TR 72). Dr. Lukavsky characterized this type of limp as moving quickly to the non-injured foot because putting weight on the injured foot creates pain. (TR 72). Dr. Lukavsky stated that this limp indicates that Claimant has a restriction in his range of motion. (TR 72). However, upon examination, Dr. Lukavsky found Claimant's range of motion to be normal. (TR 74). Dr. Lukavsky also noted that Claimant's physical

examination produced none of the following findings: deformity, swelling, atrophy, muscle weakness, muscle loss in ankle or calf, reduced plantar flexibility, flexion contraction or loss of extension, ankleosis in foot or ankle or malrotation, evidence of loss of Bolar's angle, loss of movement or impairment in toes, evidence of arthritis in calcaneocuboid joint. (TR 74-75). Dr. Lukavsky did find some residual tenderness. (TR 74).

In conducting the physical examination, Dr. Lukavsky conducted the standard range of motion tests. (TR 76). Dr. Lukavsky found that Dr. Bernicker's range of motion tests show higher or the same results as his own tests. (TR 77). Dr. Lukavsky found Claimant's range of motion to be normal. (TR 77). Dr. Lukavsky also noted that while Dr. Bernicker was showing a deterioration in the range of motion, the physical therapy notes were showing normal results. (TR 79). Dr. Lukavsky stated that the range of motion tests should not be factored into the determination of disability because the results are too subjective. (TR 79).

Dr. Lukavsky went on to discuss the AMA Guides for the evaluation of disability. Dr. Lukavsky explained why range of motion is only to be used in assessing disability when the results can be duplicated. (TR 80). Range of motion should not be used "if you can't measure the same on two days yourself, or you can't find somebody else to record the same motion, that particular determinate is valueless in evaluating disability." (TR 80). Dr. Lukavsky stated that the range of motion tests cannot be used with Claimant because Claimant's range of motion was within normal range. (TR 80).

Dr. Lukavsky went on to state that Claimant's condition fits neatly into a specific category within the Guides. (TR 81). Dr. Lukavsky stated that Claimant's injury and resulting disability fits within Table 64 of the Guides. Dr. Lukavsky explained that Claimant's injury should carry less disability weight because the injury was to a lesser area, the subtalar joint. (TR 82). Dr. Lukavsky explained further that the Guides account for a diagnosed-based disability assessment. (TR 83). The most significant injury that can occur to this area of the foot is an infra-articular fracture with displacement, but that such an injury did not occur in Claimant's case. (TR 83). Dr. Lukavsky testified that Claimant's disability is assessed at 7%. (TR 83). Dr. Lukavsky stated that this rating takes into consideration the worst case scenario of a displacement at the fracture. (TR 83).

Dr. Lukavsky stated that Claimant's condition was the easiest for which he has had to assess a disability rating within the AMA Guides. (TR 84). Dr. Lukavsky stated further that he had included all of the possibilities of the severity of Claimant's fracture when assigning the disability rating. (TR 84). Dr. Lukavsky then discussed Dr. Bernicker's assessment of a 37.5% disability. (TR 85). Dr. Lukavsky found this assessment not to be consistent with the radiographic evidence and that the radiographic evidence supports a finding of 7% disability. (TR 85).

Dr. Lukavsky also discussed Claimant's gait derangement. (TR 86). Dr. Bernicker used Table 36 in rendering his disability assessment. (TR 85). Dr. Lukavsky explained that Dr. Bernicker has stated that Claimant was wearing a brace a majority of the time. (TR 86). Dr. Lukavsky stated that if

Claimant is in fact wearing a brace a majority of the time, then Claimant would have one of the criteria for "that kind of disability rating." (TR 86). Dr. Lukavsky did note that Claimant does not have arthritis in his hip, ankle, or knee nor any injury to the major joints "of that extremity." (TR 86). Dr. Bernicker's report found that Claimant has a 15% whole person impairment. (TR 87).

Dr. Lukavsky found that Claimant is different from the individual described on page 75 of the Guides. (TR 87). Dr. Lukavsky found that Claimant does not have problems with his hips, knees, or ankles. (TR 87). Additionally, the person in the example on page 75 uses an external aid the majority of the time. (TR 87). Dr. Lukavsky understood Claimant's "can perform work activities that require considerable ambulation and that [Claimant] is performing these without the help of an external aid." (TR 87). Dr. Lukavsky stated that if one considers that Claimant does not use a brace at work because it restricts his range of motion, but does use it away from work, then the use of the brace is a subjective factor and not one of the objective factors necessary for the use of Table 36. (TR 88-89).

On cross-examination, Dr. Lukavsky stated that while he did not specifically state in his report that Claimant's range of motion was normal, he did state that Claimant's left ankle was "symmetric and equal to the right ankle." (TR 90). Dr. Lukavsky stated that this is "a parameter of normalcy" in a person. (TR 90). Dr. Lukavsky went on to state that the situation on page 541 in the 5th Edition of the AMA Guides is not applicable to Claimant because there is no evidence of ankleosis which is a fusion of the ankle. (TR 92). Dr. Lukavsky stated that in the 4th Edition of the AMA Guides there is no chart that applies limitations in range of motion to assessing disability. (TR 96). Dr. Lukavsky again stated that to apply a subjective factor such as range of motion, there must be duplication of the tests which did not occur here. (TR 96).

Dr. Lukavsky found no lower extremity impairment in Claimant at the time of the examination in April, 2001. (TR 97). Dr. Lukavsky stated that one can only quantitate weakness when there are consistent reports of the condition. (TR 97). In support of this proposition, Dr. Lukavsky referred to the 4th Edition of the AMA Guides regarding manual muscle testing. (TR 97). Dr. Lukavsky cited to the passage of that section that states as follows:

> Manual muscle testing is performed by major groups, is dependent on the patient's cooperation, and is subject to the patient's conscious and unconscious control. (Table 38, page 77). The results should be concordant with observable pathologic signs and other medical evidence. [Dr. Lukavsky explains that this is where x-rays and MRI studies come into use.] Measurements should be consistent between two trained observers. If the measurements are made by one examiner, they should be consistent on different occasions.

(TR 97). Dr. Lukavsky expands on this by stating that if the above cited criteria cannot be met, "then you're not using the objective manner of measuring" and the criteria should not be used. (TR 98).

Dr. Lukavsky further discussed Table 36 and its applicability to Claimant's condition. Dr. Lukavsky explained that in order for a person to be rated as having a 15% impairment, that the person must have not only the criteria listed in section (d) of the table but also the "underlying process to warrant wearing that brace." (TR 101). Dr. Lukavsky opined that in order for Claimant to have a 15% disability, that at least one of the factors listed in section (d) must be present. (TR 109). Dr. Lukavsky testified that the fact that Claimant feels the need to wear a brace for his condition does not correspond with the pathology. (TR 110).

As for the criteria listed in section (a), of the table, Dr. Lukavsky testified that not all of the joints listed in the criteria need to be affected, but that at least one must be a problem. (TR 105). Dr. Lukavsky testified further that it is necessary to examine the underlying cause of the need for a brace because if the brace is necessary just to make the person more comfortable, then the need for the brace is subjective and not objective. (TR 105).

Dr. Lukavsky further explained how to use Table 36 of the Guides. Dr. Lukavsky explained that sections (a) and (b) are exclusive. (TR 113). However, to rate a 15% impairment under section (c), either (a) or (b) must be present in conjunction with the criteria listed in section (c). (TR 113). Dr. Lukavsky went on to explain that while section (d) does not require the specific application of any of the other sections, that to be rated within section (d), there must be underlying pathological evidence to justify its use. (TR 114). Otherwise, Dr. Lukavsky explains, any person could employ the use of a brace and consider themselves 15% disabled without having any problem that necessitates the use of the brace. (TR 114).

The only pathologic finding in Claimant's case is the injury to Claimant's calcaneocuboid area. (TR 115). This injury, Dr. Lukavsky opines, rates a 7% disability. (TR 115). Dr. Lukavsky stated that based on his experience and the injury that Claimant sustained, there is no reason that Claimant should require the use of a brace. (TR 115). Dr. Lukavsky could find no pathologic evidence to support a finding within section (d). (TR 115).

Dr. Lukavsky continued that there can be situations where neither sections (a) nor (b) nor (c) are present and a rating within section (d) is warranted, but that is not the case here because of the lack of underlying pathologic findings. (TR 117). Dr. Lukavsky pointed out that Claimant works his normal work day without the use of the brace and therefore, Claimant's condition does not fit within section (d). (TR 118).

Dr. Lukavsky went on to discuss range of motion and his use of it in his examinations. (TR 105). Dr. Lukavsky stated that in performing his evaluations, he usually uses the passive method. (TR 105). Dr. Lukavsky stated further that neither passive nor active range of motion tests are completely objective and for that reason the need to duplicate the results is important. (TR 105-106).

Dr. Lukavsky stated that the Guides do not require either the passive or the active range of motion test to be used, but merely require that the range of motion be measured objectively to be used in assessing disability. (TR 107). Dr. Lukavsky opined that objective measurements of Claimant's range of motion were not done in this claim and therefore, range of motion is not a rateable factor in Claimant's case. (TR 106-107). Dr. Lukavsky also opined that Claimant's gait derangement cannot be used in rating his disability because it has not been objectively quantified. (TR 107). Dr. Lukavsky stated that even if Claimant's limp were taken into consideration, that Claimant's disability would be between 7% and 10-12%. (TR 109).

Dr. Lukavsky stated that the objective way to determine the level of Claimant's disability is to take a diagnosis from Claimant's medical records prepared by Dr. Lukavsky, the records of Dr. Bernicker and the MRI study report. (TR 108). Dr. Lukavsky stated that his diagnosis was delineated from all of these sources. (TR 108). Dr. Lukavsky opined that going from a disability rating of 7% to a rating of 37% is impossible. (TR 111). Dr. Lukavsky states this because even if Claimant had suffered the most serious injury that he could have to the calcaneus bone, a 37% disability rating would not be warranted. (TR 111). Dr. Lukavsky could find no objective evidence to support a rating of 37% based "solely on subjective complaints." (TR 111).

Respondents' Exhibits

On their behalf Respondents submit one exhibit for consideration by this Court. The report of Dr. William Lukavsky dated April 10, 2001 is submitted on behalf of Respondent. (EX 1). Dr. Lukavsky noted that Claimant had seen Dr. Bernicker in July, 2000. At that time, Dr. Bernicker ordered an MRI study that showed a fracture in the "distal os calcis on July 3, 2000 with progressive healing thereafter." Dr. Lukavsky also noted that the MRI showed "narrow edema in the second and third metatarsals, consistent with fracture." Claimant was treated with elevation and non-weight bearing and a prescription for an orthotic device. Dr. Lukavsky also noted that Claimant returned to work in October, 2000.

Dr. Lukavsky reported that Claimant presented with pain in the "mid foot area of his left foot." Claimant also reported to Dr. Lukavsky that he tries to avoid excessive standing on ladders while at work. Claimant also indicated to Dr. Lukavsky that he experiences discomfort with standing a bearing weight on his left foot. Dr. Lukavsky then moved to a physical examination of Claimant. Dr. Lukavsky found palpable tenderness at Claimant's mid foot and "no residual swelling, no erythma, no deformity." Dr. Lukavsky that Claimant "splints relative to the left foot." Dr. Lukavsky conducted a range of motion examination of the left ankle that Dr. Lukavsky found to be symmetric and equal to the right ankle.

Dr. Lukavsky conducted a review of Dr. Bernicker's records pertaining to Claimant. Dr. Lukavsky summarized Dr. Lukavsky's treatment and findings. Dr. Lukavsky diagnosed Claimant as suffering from a fracture of the os calcis in the left foot and possible microfractures of the 2nd and 3rd

metatarsals. Dr. Lukavsky stated that the x-rays and MRI taken after he had initially examined Claimant showed "clear osseous injuries to the left foot" that had been treated properly by Dr. Bernicker. Dr. Lukavsky found Claimant to have excellent motivation to return to work and that since Claimant returned to work in October, 2000, Claimant has worked steadily.

Dr. Lukavsky found Claimant's condition to be permanent and stationary as of December, 2000. Dr. Lukavsky reported that Claimant stated that he experience intermittent pain in his mid foot region, particularly when Claimant stands for prolonged periods on a ladder. Dr. Lukavsky determined that based on the objective evidence available that Claimant suffered an os calcis fracture on the date of the injury. However, Dr. Lukavsky found no impairment in Claimant's range of motion.

Dr. Lukavsky found that "as a consequence of his subjective residuals and objective determinable injury, he has lost 25% of his pre-injury capacity for running, jumping, walking, on uneven terrain, climbing, and similar such activities." Applying the AMA Guides, table 64, Dr. Lukavsky found that Claimant suffers from a 7% impairment of his left lower extremity. Dr. Lukavsky bases this assessment on the fact that the "os calcis fracture with deformity not actually involving the tuber being a residual of relatively minor residual anatomic abnormality."

Claimant's Exhibits

Claimant offers 17 exhibits in the above-captioned claim. Included in Claimant's exhibits are the notice of injury dated July 24, 2000, Claimant's claim for compensation dated July 26, 2000, a summary of compensation paid without an award of benefits, notice of controversion of the right to compensation dated February 1, 2001, a notice of final payment or suspension of compensation payments dated November 29, 2000. (CX 1-5). Additionally, Claimant submitted documentation relating to the issue of Claimant's average weekly wage. (CX 6-9). These documents will be discussed in depth as required in determining Claimant's average weekly wage.

Claimant also submits a summary of the temporary total disability benefits from July 26, 2000 through August 7, 2000. (CX 10). Claimant also submits the Memorandum of Informal Conference to establish entitlement to attorney fees. (CX 11). However, considering that no application for representative's fees has been submitted in this claim, this document has no applicability to the issues presently before this Court.

A report of injury and treatment was issued by Dr. Alex K. Hahn on June 28, 2000. (CX 15). Dr. Hahn described Claimant's injury as occurring when Claimant "stepped in a small hole in deck grating, left foot, possible sprain" on June 25, 2000. Dr. Hahn diagnosed "left ankle, foot sprain, hematoma, rule out fracture." Dr. Hahn released Claimant to light duty work on June 26, 2000 and full duty with no limitations on June 29, 2000. Dr. Hahn limited Claimant, while on light duty status, to no prolonged standing, walking, climbing, bending, or stooping. Claimant was also not permitted to lift over 25 pounds.

Medical slips from Claimant's visits to Dr. Lukavsky are also included in the record in this claim. (CX 16). Dr. Lukavsky had limited Claimant to "sit down work only" from July 25, 2000 through August 8, 2000. Also included is a physical therapy noted dated August 14, 2000. (CX 17).

Two MRI reports dated August 14, 2000 are included in the record in this claim. (CX 12). The reports were authored by Dr. John V. Crues III. Dr. Crues is board certified in internal medicine and radiology.[2] There are two MRIs addressed in these reports. One was of Claimant's left ankle that showed a "comminuted fracture of the distal calcaneus and subchrondal bone of the articulating process of the cuboid. There is also a report of the MRI done on Claimant's left foot. This MRI revealed a "comminuted fracture of the distal calcaneus." Additionally, the report notes marrow edema within the second and third metatarsals "compatible with stress fracture with associated surrounding soft tissue edema." A trabecular bone injury was also noted at the base of the first metatarsal.

The reports of Dr. Jeffrey Bernicker are included in the claimant's exhibits. (CX 13). Dr. Bernicker first examined Claimant on July 31, 2000 and issued a report dated August 7, 2000. Dr. Bernicker reviewed Claimant's medical records and noted Claimant's work history. According to Dr. Bernicker's report, Claimant began working for Respondent as an electrician on August 10, 1999. Dr. Bernicker summarizing Claimant's job duties as including: installing and maintaining all electrical systems on board ships and on land; standing, walking, bending, twisting, reaching, lifting 75 pounds, squatting, kneeling, climbing, pushing, pulling, crawling, and overhead work.

Dr. Bernicker also summarized the activities that resulted in Claimant's injury. Claimant presented to Dr. Bernicker with the chief complaint of pain in his left foot. Dr. Bernicker noted that on June 25, 2000 Claimant twisted his left foot when he stepped into an uncovered hole. Claimant reported an immediate onset of pain with associated swelling. Claimant reported the injury and was taken to Dr. Hahn. Dr. Hahn prescribed medications and placed Claimant on light duty. Claimant was then returned to full duty.

Claimant continued to report pain and was referred to Dr. Lukavsky in July, 2000. According to Claimant's report, Dr. Lukavsky placed Claimant on light duty and prescribed a short course of physical therapy. Claimant was taken off of work because no light duty assignments were available. Dr. Bernicker noted that at the time of the examination, Claimant reported "left ankle and foot pain which [Claimant] describes as constant." Claimant also reported radiation of pain into his ankle and some numbness in his third toe. Claimant also reported a limitation on his range of motion and a popping and grinding sound in his ankle.

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[2] I take official notice of Dr. Crues' credentials from the American Board of Medical Specialties.

Dr. Bernicker observed swelling in "the vicinity of the left foot." Dr. Bernicker also noted that Claimant reported an increase in pain when squatting, kneeling, crawling, and going up and down stairs. Claimant also stated that after standing for one minute he begins to experience pain. Dr. Bernicker then reviewed the previously taken x-rays and found no evidence of any fractures. Upon physical examination, Dr. Bernicker noted that Claimant requires a cane to ambulate. Upon examining Claimant's left foot and ankle, Dr. Bernicker notes mild swelling over the "dorsolateral area of the ankle." Dr. Bernicker also observed tenderness "along the medial and lateral aspects of the foot and dorsum." Dr. Bernicker noted "point tenderness over the deltoid ligaments along the medial aspect of the ankle and over the anterior talofibular ligament and calcaneofibular ligament on the lateral aspect of the ankle."

Dr. Bernicker assessed Claimant's range of motion and also noted no evidence of instability. As an incidental finding, Dr. Bernicker noted that Claimant's 3rd and 4th digits on his left foot overlap. At this time, Dr. Bernicker's impression was that Claimant had suffered a twisting injury to his left foot and ankle. Dr. Bernicker also believed that ligament injury and occult fracture of the calcaneus needed to be ruled out. Dr. Bernicker determined that Claimant was able to resume light duty work.

Also included in Dr. Bernicker's documentation are progress reports. Dr. Bernicker also issued a report dated December 4, 2000. In that report, Dr. Bernicker noted that Claimant had follow up examinations on August 8, 2000 and August 12, 2000. Dr. Bernicker also noted that a MRI study was completed on August 14, 2000 showing a "significant fracture" of the calcaneus and stress fractures in the 2nd and 3rd metatarsals. Dr. Bernicker also notes a August 21, 2000 x-ray that showed a comminuted fracture "of the anterior process of the calcaneus with collapse of the middle facet of the calcaneus and associated sclerosis."

A September 14, 2000 x-ray was also noted in this report. That x-ray confirmed that Claimant's fracture was healing. This x-ray lead to the imposition of a physical therapy program. Dr. Bernicker followed up with Claimant on October 13, 2000 when Claimant reported that the physical therapy was giving Claimant some relief with his symptoms and Claimant was walking without any assistive devices. Dr. Bernicker noted Claimant's final visit on November 14, 2000. At that time, Claimant had been returned to work on regular duty.

Dr. Bernicker stated that Claimant had persistent symptoms in his left foot with constant pain that occasionally radiated into the ankle. Claimant also reported some numbness in the 3rd toe. Dr. Bernicker observed some instability in Claimant's ankle, limited range of motion with grinding on inversion, and swelling in the foot and ankle. Claimant reported that he continued to have difficulty ascending and descending stairs. Claimant's increase in symptoms at that this time occurred after standing for one hour.

A November 14, 2000 x-ray revealed a healed calcaneous fracture "involving anterior process and middle facet area. Collapse of the middle facet is noted with associated sclerosis. [The] calcaneocuboid joint is noted to be well preserved, as is the subtalar joint." Dr. Bernicker noted that

Claimant's foot showed "diffuse tenderness surrounding the ankle medially and laterally." Dr. Bernicker also noted point tenderness over the sinus tarsi.

In his December 4, 2000 report, Dr. Bernicker found that Claimant's condition is status post left calcaneus fracture. Dr. Bernicker opined that Claimant's condition was a direct result of the injury incurred on June 25, 2000. Dr. Bernicker laid out Claimant's subjective complaints as including "constant and slight to moderate, on occasion progressing to moderate with strenuous activities." Dr. Bernicker also pointed out that Claimant is able to tolerate the pain but that the pain "would cause marked handicap in performance of those activities precipitating the symptoms." Objectively, Dr. Bernicker noted that Claimant's radiographs demonstrating a calcaneus fracture, the MRI confirming the fracture, and decreased range of motion. At this point, Dr. Bernicker considered Claimant's condition to be permanent and stationary.

Dr. Bernicker also discussed Claimant's disability of the left foot and ankle. Dr. Bernicker found Claimant's disability to be "equivalent to prophylactic disability precluding prolonged weightbearing." Dr. Bernicker opined that Claimant would be able to work 75% of the time involving standing and walking. Dr. Bernicker opined that the other 25% of the time, that Claimant would need to be seated. Dr. Bernicker found Claimant's prophylactic disability precludes "repetitive climbing, repetitive walking over uneven ground, repetitive squatting, repetitive kneeling, repetitive crouching, repetitive crawling, repetitive pivoting, and other activities involving comparable repetitive physical effort.

Dr. Bernicker issued a supplemental report on January 26, 2001. Dr. Bernicker issued this report because he had not applied the AMA Guides in the previous report. Dr. Bernicker opined that there are multiple ways to assess a person's disability, one of which is by measuring the loss of Boehler's angle. Claimant did not suffer a loss of Boehler's angle because Claimant's injury was not through the body of the calcaneus and did not involve the anterior process.

Dr. Bernicker went on to explain that the use of Table 42 in the Guides allows for estimating impairment in ankle motion, and Table 36 assesses impairment based on gait derangement. Dr. Bernicker went on to explain that the Guides allow for discretion "to assess impairment due to gait derangement if this is felt to best reflect the basic pathologic process." Therefore, Dr. Bernicker applied Table 36 to Claimant's condition. Dr. Bernicker pointed out that Claimant "does require the use of an ankle air cast brace for ambulatory purposes. This would be covered under the section marked 'mild in severity' and would give him a Whole Person impairment of 15 percent."

On February 28, 2001, Dr. Bernicker issued another supplemental report. Dr. Bernicker, at this time, determined that Claimant has a lower extremity impairment of 37.5 percent. Dr. Bernicker stated that this number is calculated by dividing the Whole Person Impairment by 0.4.

JURISDICTION

Neither party has contested the fact that jurisdiction exists under the Longshore and Harbor Workers' Compensation Act. I find that jurisdiction is supported by the evidence of record. Therefore, I find that jurisdiction exists under the Longshore and Harbor Workers' Compensation Act.

RESPONSIBLE EMPLOYER

Claimant's injury occurred while Claimant was employed by Continental Maritime of San Diego on June 25, 2000. No party has contested that Claimant was injured within the scope and course of his employment and that an employer/employee relationship existed at the time of the injury. Accordingly, Continental Maritime of San Diego is the properly designated responsible employer.

TIMELINESS OF NOTICE

An employee has 30 days to provide notice to the employer of injury or death. 33 U.S.C. § 912. The time limitation begins when reasonable diligence would have disclosed the relationship between the injury and the employment. 33 U.S.C. § 912(a). A presumption exists in favor of sufficient notice of the claim having been given. 33 U.S.C. §912(b). The injury occurred on June 25, 2000. The Notice of Injury was filed July 24, 2000. (CX 1). Additionally, Claimant testified that he informed Respondent of the injury on the date that the injury occurred. (TR 13). Accordingly, I find that timely notice was provided.

TIMELINESS OF CLAIM

The timeliness of the claim must be considered. Claimant's timely filing of the claim was not challenged by Respondents. As such, I find that the claim was filed timely.

AVERAGE WEEKLY WAGE

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978); *Barber v. Tri-State Terminals*, 3 BRBS 244 (1976), *aff'd sub nom. Tri-State Terminals v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's average and annual wages where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to subsection (c) if subsections (a) and (b) cannot be reasonably and fairly applied. Robert Babcock, Compensation - Section 10, The Longshore Textbook 42 (D. Cisek ed. 1991).

Section 10(a) of the LHWCA provides:

> Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. § 910(a). Section 10(a) applies if the employee "worked in the employment ... whether for the same or another employer, during "substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Duncan v. Washington Metro. Area Transit Auth.,* 24 BRBS 137, 140 (1990); *Taylor v. Smith & Kelly Co.,* 14 BRBS 489, 495 (1981).

Section 10(a) cannot be applied where there is no evidence in the record from which an average daily wage can be calculated. *Lobus v. I.T.O. Corp.*, 24 BRBS 137, 140 (1990); *Taylor v. Smith & Kelly Co.,* 14 BRBS 489, 495 (1981). Section 10(a) is distinguished from 10(b) in that the section is applicable only when the employee worked "substantially the whole of the year" preceding the injury.

"Substantially the whole of the year" refers to the nature of the claimant's employment. *Mulcare v. E.C. Ernst, Inc.,* 18 BRBS 158, 159-60 (1986); *Eleazer v. General Dynamics Corp.,* 7 BRBS 75, 79 (1977). That is to say, whether the employment is intermittent or permanent. *Duncan,* 24 BRBS at 136. See also *Gilliam v. Addison Crane Co.,* 21 BRBS 91 (1987). In *Duncan,* the Board considered 34.5 weeks of work to be "substantially the whole of the year", where the work was characterized as "full time" and "steady" or "regular." *Id.*

Respondent argues that Section 10(a) is clearly applicable to the claim before this court. However, Respondent admits that from the evidence before this Court an average daily wage cannot be computed. *See* Respondent's post-hearing brief, p. 9. I agree that an average daily wage cannot be computed in this claim because the record is unclear as to the amount of days that Claimant worked in the 52 weeks preceding the injury. Although it appears from some of Claimant's testimony that a five

day work week was Claimant's usual schedule, that fact is not completely clear.[3] Therefore, I find the application of Section 10(a) inappropriate in the above-captioned claim.

Where Section 10(a) is inapplicable, application of Section 10(b) must be explored before resorting to application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) of the LHWCA provides:

> Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings if a six-day worker, shall consist of three hundred times the average daily wage or salary and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

33 U.S.C. § 910(b). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" (within the meaning of Section 10(a)), prior to his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vac'd in part on other grounds*, 462 U.S. 1101 (1983); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153 (1979).

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[3] Claimant testified that work completed on Saturdays and Sundays is overtime work. (TR 46). Additionally, the following exchange occurred inferring that Claimant's normal work week involved the customary five days.

> Q: Are there any other days when you wear your brace other than the weekdays after work?
>
> A: Yes, I wear it on the weekends also.

(TR 19). While this testimony can be inferred to mean that Claimant customarily works on the five weekdays. I find that this exchange is not enough to rely on in applying Section 10(a).

Section 10(b) looks to the wages of other workers in the same employment situation and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). Accordingly, the record must contain evidence of the substitute employee's wages. *Palacios v. Campbell Indus.,* 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978); *Sproull v . Stevedoring Servs. of America,* 25 BRBS 100, 104 (1991); *Duncan v. Washington Metro. Area Transit Auth.,* 24 BRBS 133, 135 (1990); *Jones v. U.S. Steel Corp.,* 22 BRBS 229 (1989); *Taylor v. Smith & Kelly Co.,* 14 BRBS 489 (1981).

No evidence has been presented in this claim to establish the wages of employees of the same class who worked substantially the whole of the year preceding the injury in the same or similar employment in the same or neighboring place. The application of Section 10(b) would be inappropriate in this claim. Therefore, it is appropriate to apply the provisions of Section 10(c) to determine the claimant's average weekly wage.

Section 10(c) of the LHWCA provides:

> (c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

Section 10(c) is a general, catch all provision applicable to cases where the methods at subsection (a) and (b) cannot realistically be applied. Section 10(c) is used: (1) Where there is insufficient evidence in the record to make a determination of average daily wage under either subsections (a) and (b), *Todd Shipyards Corp. v. Director, OWCP,* 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), *aff'g and remanding in part* 1 BRBS 159 (1974); *Sproull v. Stevedoring Servs. of America,* 25 BRBS 100, 104 (1991); *Lobus,* 24 BRBS at 140; *Taylor v. Smith & Kelly Co.,* 14 BRBS 489 (1981); and (2) Whenever Sections 10(a) or 10(b) cannot reasonably and fairly be applied and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury, *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir.); *Walker v. Washington Metro. Area Transit Auth.,* 793 F.2d 319 (D.C. Cir. 1986), *cert. denied,* 479 U.S. 1094 (1987); *Browder v. Dillingham Ship Repair,* 24 BRBS 216, 218 (1991);

Lobus v. I.T.O. Corp., 24 BRBS 137, 139 (1990); *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987).

The judge has broad discretion in determining annual earning capacity under Section 10(c). *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 105 (1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Lobus v. I.T.O. Corp.*, 24 BRBS 137, 139 (1990); *Bonner v. National Steel and Shipbuilding Co.*, 5 BRBS 290, 293 (1977), *aff'g in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). The objective of Section 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of the injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823, 25 BRBS 26 (CRT) (5th Cir. 1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Richardson v. Safeway Stores*, 14 BRBS 855, 859 (1982).

Unlike Sections 10(a) and (b), subsection (c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury. *Empire United Stevedoes v. Gatlin*, 936 F.2d 819, 823, 25 BRBS 26 (CRT) (5th Cir. 1991); *Tri-State Terminals v. Jesse*, 596 F.2d 752, 756 (7th Cir. 1979); *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981). Actual earnings are not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288 (1979), *aff'g in relevant part* 5 BRBS 290 (1977). In calculating annual earning capacity under Section 10(c), the judge may consider: the actual earnings of the claimant at the time of the injury; the average annual earnings of others; the earning pattern of the claimant over a period of years prior to the injury; the claimant's typical wage rate multiplied by a time variable; all sources of income including earnings from other employment in the year preceding injury, overtime, vacation or holiday pay, and commissions; the probable future earnings of the claimant; or any fair and reasonable alternative.

Section 10(c) "explicitly provides that a claimant's average annual earnings under this subsection shall have regard for his earnings at the time of injury ..." *Hayes v. P&M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991)' 33 U.S.C. § 910(c). Accordingly, it may be reasonable to focus only on the actual earnings of the claimant at the time of the injury. *Hayes*, 23 BRBS at 393; *Harrison v. Todd Pac. Shipyards Corp.*, 22 BRBS 104 (1989).

Actual earnings in the year preceding Claimant's injury may not be a fair and reasonable representation of Claimant's wage-earning capacity where Claimant's wages were reduced for reasons such as personal injury, strikes, layoffs, or the unavailability of work; or Claimant's wages increased prior to the injury due to a promotion, pay raise, or working an increased number of hours.

I find that while the documents establishing Claimant's earnings for the 52 weeks prior to the date of the injury are insufficient to establish the average daily wage because the number of days worked are not included in those records, that the actual earnings in those 52 weeks fairly and reasonably reflect Claimant's wage earning capacity.

While Section 10(c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury, it is within the discretion of this Court to find that those wages do represent Claimant's wage earning capacity. It is also true that it is within the province of this Court to consider any of the following: the actual earnings of the claimant at the time of the injury; the average annual earnings of others; the earning pattern of the claimant over a period of years prior to the injury; the claimant's typical wage rate multiplied by a time variable; all sources of income including earnings from other employment in the year preceding injury, overtime, vacation or holiday pay, and commissions; the probable future earnings of the claimant; or any fair and reasonable alternative.

None of the factors that may influence Claimant's wages are present in this claim. Additionally, Claimant's income from a profit sharing plan is not to be considered in determining Claimant's wage-earning capacity. In *Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989), the Benefits Review Board determined that the "claimant was more like an employee than an owner", and therefore, considering the claimant's share of the profits in determining wage earning capacity was inappropriate. *Id.* at 406. I find such to be true here also. Claimant's position was more like that of an employee than that of an owner, and therefore, any income that Claimant derived from the profit sharing plan is not properly included in determining Claimant's wage-earning capacity. Therefore, I find that since Claimant worked consistently in the 52 weeks preceding his injury, his actual earnings are the most accurate representation of Claimant's earning capacity.

Claimant's wages for the 52 weeks prior to the date of the injury are split between two employers. In order to determine Claimant's earnings for the 52 weeks prior to the date of the injury, it is necessary to examine Claimant's earning records encompassing June 21, 1999 through June 25, 2000. This encompasses Claimant's work for 52 weeks. Respondent advocates that only the earnings from National Steel and Shipbuilding from June 25, 1999 through August 15, 1999 should be used in determining Claimant's average weekly wage. I find Respondent's argument, even though it was based on the application Section 10(a), to be persuasive.

Claimant worked for National Steel and Shipbuilding from June 21, 1999 through August 15, 1999. (CX 8). In that time period, Claimant earned $8,295.26. From August 9, 1999 through June 25, 2000, Claimant was employed by Respondent. In that time period, Claimant earned $30,948.55 in gross wages. I find that these earning represent Claimant's earning capacity at the time of the injury. Therefore, Claimant's yearly income for the 52 weeks preceding the injury is equal to $39,243.81.

The judge must arrive at a figure which approximates an entire year of work (the average annual earnings). That figure is then divided by 52, as required by Section 10(d), to arrive at the average weekly wage. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

Section (d)(1) mandates that the claimant's average annual earnings be divided by 52 to arrive at an average weekly wage. The Board reiterates the mandatory application of the 52-week divisor.

Klubnikin v. Cresent Wharf & Warehouse Co., 16 BRBS 182 (1984); *Roundtree v. Newpark Shipbuilding & Repair*, 13 BRBS 862 (1981), *rev'g* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.), *cert. denied*, 469 U.S. 818 (1984); *Eckstein v. General Dynamics Corp.*, 11 BRBS 781 (1980); *Strand v. Hansen Seaway Serv.*, 9 BRBS 847 (1979), *rev'd and remanded in part on other grounds*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980).

Therefore, I find that the claimant's average weekly wage is his annual wages, $39,243.81, divided by 52, producing an average weekly wage of $754.69. The claimant is entitled to a compensation rate of $502.62 per week.

NATURE AND EXTENT OF DISABILITY

The first issue to determine with respect to the nature and extent of Claimant's disability is whether the injury is temporary or permanent. A finding that a disability is permanent has several effects. First, in the case of total disability, it allows the addition of a cost of living increase to the Claimant's benefits. *See* 33 U.S.C. § 910(f). Second, only payments by employers made for permanent disability are credited against the 104-week obligation, for purposes of contribution by the Special Fund, under Section 8(f) of the Act. *See* 33 U.S.C. § 908(f). Third, a Claimant's entitlement to benefits for a scheduled disability begins on the date of permanency. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 (1985).

The date on which a Claimant's condition has become permanent is primarily a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984); *Rivera v. National Metal & Steel Corp.*, 16 BRBS 135, 137 (1984); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981); *Greto v. Arpaia & Chapman*, 10 BRBS 1000, 1003 (1979).

Both Drs. Bernicker and Lukavsky agree that Claimant's condition reached permanent and stationary status on December 4, 2000. Therefore, neither party is disputing that Claimant reached maximum medical improvement on December 4, 2000. I find this date to be supported by the evidence of record. Therefore, I find that Claimant reached maximum medical improvement on December 4, 2000.

Unless a worker is totally disabled, he is limited to the compensation under the appropriate schedule provisions. *Wilson v. Ingalls Shipbuilding*, 16 BRBS 168, 172 (1984). No party has alleged that Claimant is totally disabled, therefore, Claimant is limited to compensation under the appropriate schedule provisions. Compensation for permanent partial disability:

> shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee as follows:
>
> (2) Leg lost, two hundred and eighty-eight weeks' compensation.
>
> (19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

33 U.S.C. § 8(c)(2)(19).

There, however, is a dispute as to the extent of Claimant's disability. Claimant's has returned to his work as an electrician journeyman. Therefore, whether Claimant is able to return to his work as an electrician journeyman is not an issue in this claim. In determining the level of Claimant's impairment, I am not bound by any particular formula. "[T]he Act does not require adherence to any particular guide or formula" and that the "administrative law judge was not bound by the doctor's opinion nor was he bound to apply the Guides or any other particular formula for measuring disability." *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053, 1055 (1978).

Several physician opinions appear as a part of the record in this claim. Dr. Bernicker found that as of December 4, 2000, Claimant suffers from a healed left calcaneus fracture. Applying Table 36 of the AMA Guides, Dr. Bernicker found that Claimant suffers from a Whole Person impairment of 15% and a lower extremity impairment of 37.5%. Dr. Bernicker bases this assessment on Claimant's use of an ankle air cast and a belief that Claimant's gait derangement is the best way to assess Claimant's underlying pathologic process. Additionally, Dr. Bernicker bases his assessment on both the objective and subjective factors outlined in his December 4, 2000 report.

Dr. Lukavsky found that Claimant suffers from a 7% lower extremity impairment based on his use of Table 64 of the AMA Guides. Dr. Lukavsky opines that he bases this assessment on the worst case scenario of Claimant's injury. Dr. Lukavsky does not take into consideration Claimant's use of an air cast because Dr. Lukavsky found that Claimant's use of the air cast is a purely subjective factor because there is no underlying pathology present that would necessitate the use of the cast. Dr. Lukavsky stated that even considering Claimant's limp in the calculation of the impairment, he would find that Claimant was only 10-12% impaired.

It is within the discretion of this Court to "assess a degree of disability different from the ratings found by physicians if that degree is reasonable." *Id., citing Mazze,* 9 BRBS at 1053. However, in light of the reports offered in this claim and the testimony adduced at the hearing, I find the opinion of Dr. Lukavsky to be more persuasive on the issue of Claimant's permanent partial disability.

I base this finding of the fact that I find Dr. Lukavsky's application of the AMA Guides to be more persuasive. Dr. Lukavsky provided detailed testimony as to his application of the AMA Guides. At the time of the hearing in this matter, Dr. Lukavsky testified as to his understanding of the AMA Guides and the proper application of the criteria listed therein. Additionally, Dr. Lukavsky explained why subjective factors are not to be considered in determining the level of disability unless the results of the subjective testing can be reproduced. Dr. Bernicker offers no explanation as to why he considered Claimant's use of the air cast as a factor in rendering his opinion when Claimant has admitted that he uses the brace infrequently. Dr. Bernicker also does not discuss the underlying pathology that would necessitate Claimant using the air cast. Therefore, I find Dr. Lukavsky's opinion to be far more persuasive and better reasoned. Therefore, I find, in accordance with Dr. Lukavsky's evaluation of Claimant, that Claimant suffers from a 12% impairment of the lower extremity.

MEDICAL BENEFITS

"The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). For Claimant to receive medical expenses, the injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). Once a Respondent is found to be liable for the payment of disability compensation benefits, that Respondent is also liable for medical expenses incurred as a result of the Claimant's injury, pursuant to Section 7(a). *Perez v. Sea-Land Servs., Inc.*, 8 BRBS 130, 140 (1978).

Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). Once a physician finds treatment necessary for the work-related condition, Claimant has established a prima facie case for compensable medical treatment. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). In order for a medical expense to be assessed against Respondent, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). It is the Respondent's burden to raise the issue of the reasonableness and necessity of the treatment. *Salusky v. Army & Air Force Exchange Service*, 2 BRBS 22, 26 (1975).

Claimant's right to select his own physician is well-settled, pursuant to Section 7(b). 20 C.F.R. § 702.403; *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for the work-related injury. 20 C.F.R. § 702.401(a); *Tough v. General Dynamics Corp.*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978).

It is Respondents' duty to furnish appropriate medical care for the Claimant's left lower extremity injury, "and for such period as the nature of the injury or the process of recovery may

require." As such, I find that Claimant is entitled to medical benefits for such time that the nature of the injury requires.

ATTORNEY'S FEES AND COSTS

Thirty (30) days is hereby allowed to Claimant's counsel for the submission of such an application. A service sheet showing that service has been made upon all parties, including Claimant, must accompany the application. Parties have fifteen (15) days following receipt of any such application within which to file an objections.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the record as a whole, the following shall become the final order of this court. Any specific numeric computations of the compensation award shall be performed by the District Director.

IT IS ORDERED THAT:

1. Respondents shall pay to Danny Cohen compensation for permanent partial disability due to a permanent 12% loss of use of his left lower extremity caused by a June 25, 2000 left foot injury, based on the average weekly wage of $754.69 and a compensation rate of $502.62, such compensation to be computed in accordance with Section 8(c)(2) and Section 8(c)(19) of the Act.

2. The permanent partial disability benefits to which Danny Cohen is entitled shall begin on the date of maximum medical improvement, December 4, 2000 and continue until such time as provided by statute.

3. Respondents shall furnish Danny Cohen with medical benefits for such period as the nature of the injury may require.

4. Respondents shall receive credit for all amounts of compensation previously paid to Claimant as a result of the June 25, 2000 accident.

5. Claimant shall be entitled to interest on any past due benefits.

A
ROBERT J. LESNICK
Administrative Law Judge